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Impressions of the Sixth Hague Joint Conference: 'From Government to Governance? The Growing Impact of Non-State Actors on the International and European Legal System'

Esther Kentin*

The Sixth Hague Joint Conference on Contemporary Issues of International Law was held in the grandeur of the beautiful Kurhaus Hotel from 3 to 5 July 2003. The Hague Joint Conference is organized by the American Society of International Law, the Netherlands International Law Association and the T.M.C. Asser Institute and takes place every two years. This year, the theme of the Conference was 'From Government to Governance? The Growing Impact of Non-State Actors on the International and European Legal System'. This subject was further explored in three parallel seminars entitled 'International Organizations and Good Governance', 'Multinational Business and Corporate Governance' and 'Responding to International Terrorism'. This report presents some impressions of the Conference to the readers of this journal.

In his opening speech, the Dutch Minister of Justice, Piet Hein Donner, addressed the changing environment of international law. In his speech, Mr Donner referred to the influence of non-State actors, such as non-governmental organizations (NGOs), and to the shift of balance between right and might in the international arena.

Judge Pieter H. Kooijmans of the International Court of Justice (ICJ) discussed the role of non-State actors – such as individuals, corporations, NGOs and international governmental organizations (IGOs) – in international dispute settlement and illustrated his speech with his experiences on the bench. He recalled *Republic of the Congo* v. *France*[1] and *Mexico* v. *United States*,[2] in which the interests of individuals played an essential role, and noted that the ICJ is increasingly confronted with issues that go beyond ordinary interstate affairs. However, the ICJ has so far been reluctant to allow submissions from non-State

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[1] ICJ, Certain Criminal Proceedings in France (*Republic of the Congo* v. *France*), Application, 9 December 2002, available online at <http://www.icj-cij.org/icjwww/idecisions.htm> (last visited 1 September 2003).

[2] ICJ, Avena and other Mexican Nationals (*Mexico* v. *United States of America*), Application, 9 January 2003, available online at <http://www.icj-cij.org/icjwww/idecisions.htm> (last visited 1 September 2003).

actors, both for practical reasons and as a result of the unwillingness of most States in this regard. Arguments in favour of allowing submissions from non-State actors include the impact of ICJ decisions on civil society. According to Judge Kooijmans, the ICJ, as the guardian of the UN system, should strengthen its capacity as an institution for global justice. He concluded with the observation that opening up the ICJ for submissions from non-State actors was inevitable in the long term, the only question being how this should be done.

For the readers of this journal, the seminar entitled 'Multinational Business and Corporate Governance: The Role of Multinational Business Corporations and the Development of Principles of Corporate Governance and Issues of Transnational Litigation, including International Jurisdiction and Treaty Cooperation to Improve Capital Flows' was of particular interest. The first two sessions of this seminar focused on the business community as a non-State actor in the development of international public law and are reported below.

The first session considered the role of internal and external codes of conduct in relation to corporate governance and addressed the responsibility of corporations to shareholders and other stakeholders. The moderator of the session, René van Rooij of Royal Dutch/Shell Group, talked about the increasingly vague border between private and public law in this area. He referred to the human rights provisions in Shell's business principles as an example of a private actor including issues of public interest in its policies.

Lucy Reed of Freshfields Bruckhaus Deringer, an international law firm, gave an overview of the latest developments in the field of corporate responsibility. An increasing number of multinational corporations, renewed interest in human rights and extensive media coverage of projects around the world have forced companies to pay more attention to their appearance and behaviour in the field of human rights and in relation to labour and environmental issues. This has led to the adoption of an increasing number of corporate codes of conduct. Many multinational corporations have thus embraced private, internal codes of conduct. At the same time, however, several international organizations have adopted public, external codes of conduct, such as the OECD's Guidelines for Multinational Enterprises and the UN Global Compact.

The presentation of Professor Willem van Genugten of the University of Tilburg focused on the voluntary character of codes of conduct. He questioned the assertion that voluntary codes of conduct can never be enforced and argued that there is a grey area between what can be described as 'voluntary' and 'legally binding'. When companies make promises to their consumers that they cannot fulfil, these consumers may have a case against those companies. Several international codes of conduct include implementation mechanisms, which render them at least quasi-legally binding.

Michel Nussbaumer of the European Bank for Reconstruction and Development drew the attention of the audience to the Bank's activities in promoting corporate governance in Eastern European countries. According to Mr

Nussbaumer, the legislation of these countries is still suffering from the effects of Soviet dominance. The Bank is running several projects that address the quality and effectiveness of current legislation. He concluded with the observation that a lot still remains to be done.

Jaap Winter of Erasmus University Rotterdam discussed developments regarding legal rules on corporate governance. He identified several obstacles to the adoption of binding rules, such as the fact that companies differ considerably in size, market, production and ownership. In addition, the activities and methods of companies change at a rapid pace. Mr Winter pointed out some of the advantages of self-regulation. For example, companies can develop and, where necessary, update the above-mentioned rules on a regular basis. This provides a welcome degree of flexibility, provided that it is backed up with legislation on accountability.

The second session of the seminar dealt with corporate responsibility for human rights and environmental damage, with a focus on transnational litigation. The moderator of this session, Georg Berrisch of Covington & Burling, an international law firm, introduced the topic and raised the question whether national courts are the appropriate forum for the enforcement of human rights.

Malgosia Fitzmaurice of Queen Mary & Westfield College, London, started her presentation by examining *Wiwa* v. *Shell*[3] in relation to the US Alien Tort Claims Act (ATCA) and the doctrine of *forum non conveniens*. This doctrine implies that a defendant may invoke the argument that the forum in question is inappropriate, because another, more appropriate forum is available, in this case the Netherlands or the United Kingdom. In the *Wiwa* case, a daughter of Ken Saro-Wiwa, who resided in the United States, brought a claim against Shell before the US District Court of New York. While the District Court dismissed the case on the basis of *forum non conveniens*, the US Court of Appeals for the Second Circuit reversed this decision, stating, *inter alia*, that adjudicating human rights claims in US courts is in the interest of justice.

The second presentation of this session was given by Pieter Bekker of White & Case, an international law firm, and concerned the question whether contemporary international law recognizes the liability of corporations that are accused of 'aiding and abetting' human rights violations and acts causing environmental damage. He argued that, in several ATCA cases in the United States, claims were based on breaches of international law, as the latter does not support the 'aiding and abetting' doctrine of corporate liability as such. He pleaded for a return to the sources of international law as laid down in Article 38 of the Statute of the International Court of Justice, in other words, to a more restrictive approach to international law by US courts.

The next speaker, Harold Hongju Koh of Yale Law School, an expert on

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[3] *Wiwa* v. *Royal Dutch Petroleum Co*., 226 F.3d 88 (2d Cir. 2000).

ATCA cases, dispelled four myths about corporate responsibility litigation in the United States. First, corporations can be held liable for certain crimes under international law, even if they cannot be held directly liable. Neither States nor individuals should be able to escape liability by hiding behind a corporation. Second, only a limited number of cases have been brought under the ATCA, and no corporations have as yet been convicted. Third, since there has been no flood of suits, there is no need for legislative or judicial reform. Fourth, litigation should not be the only means of addressing corporate responsibility: international rules would constitute a better means.

Then it was the turn of André Nollkaemper of the University of Amsterdam to address the subject. He noted that Dutch courts have a rather reserved attitude towards the application of international norms in civil liability cases, despite the openness of the Dutch legal system towards international law. He suggested middle path that would assign some interpretative value to public international law in national courts. He also drew attention to a very recent development on the international legislative agenda, namely, the *Draft Norms of Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*,[4] prepared by a Working Group of the Sub-Commission on the Promotion and Protection of Human Rights of the Office of the United Nations High Commissioner for Human Rights. This document contains substantive norms that directly address transnational corporations.

Professor Andrew Clapham of the Graduate Institute of International Studies, Geneva, told the audience about the negotiations on the Statute of the International Criminal Court (ICC), during which a working group on legal persons was established. Just because the term 'legal persons' was not included in the ICC Statute, does not mean that issue of legal persons was excluded as such. The question is how to address the issue. Professor Clapham stated that it could be a subject for the review conference, which is slated for 2009. He then addressed the development of ATCA cases in US courts, explaining that, in ATCA cases, civil law is applied on the basis of violations of international law. In *Doe* v. *Unocal*,[5] the key question was whether crimes had been committed and whether the corporation had provided practical assistance. The *Wiwa* case is far more complicated, however, because Shell is accused of preventing freedom of expression. Other questions in the case relate to the status of human rights law. Human rights law is part of customary international law, but does that create an obligation for Shell even if the company makes a reference to the Universal Declaration of Human Rights in its business principles? In

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[4] Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., Agenda Item 4, UN Doc. E/CN.4/Sub.2/2003.12.Rev.1, available online at <http://www.unhchr.ch> (last visited 15 August 2003).

[5] *Doe* v. *Unocal Corp.*, 2002 WL 31063976 (9th Cir. 2002).

conclusion, Clapham argued that civil law instruments are indispensable for addressing human rights violations.

In his presentation, Michael Addo of the University of Exeter emphasized the complementarity of voluntary and legal instruments for the enforcement of human rights by corporations. He pointed to a number of voluntary approaches, such as international codes of conduct in the field of business. Peer pressure and media coverage have contributed to increased awareness and – potentially – to better behaviour. However, Mr Addo argued that voluntary initiatives have to be complemented by legal regulation. The human rights responsibility of corporations needs direction and vision, which the law should provide by defining a legal framework.

The President of the ICJ, Judge Shi Jiuyong, spoke at the closing session of the Conference. He distinguished between three groups of non-State actors, which are unified only by one negative characteristic, namely, that they are not States. Their unique features, which make them distinctive and significant in the international legal system, are what define each of these groups. Judge Shi observed that international organizations are the most prominent group of non-State actors. He noted that although intergovernmental organizations are formed by governments, they are independent from them and have a separate legal personality. The ICJ recognized the unique status of the United Nations in its 1949 Advisory Opinion in the *Reparation* case.[6] Judge Shi noted that the United Nations continues to be at the core of the development and codification of international law.

The second group of non-State actors are NGOs, which do not form a uniform group but comprise a wide range of organizations, from voluntary organizations and grass-roots groups to trade unions, legal centres and research institutions. Judge Shi argued that although NGOs have played a major role in the development of international law, especially since the end of the Cold War, by participating in negotiations, influencing agendas and debates and monitoring implementation, their activities do not challenge the primacy of States in the field of international law-making.

The third key group of non-State actors that has gained an increasingly prominent role in the development of the international legal system are transnational corporations (TNCs). Judge Shi pointed out that TNCs influence the development of international law in at least two ways. First, like NGOs, they lobby treaty-making processes to support an outcome that is more favourable to business. Second, by controlling substantial economic resources, they may influence State agendas and behaviour.

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[6] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 11 April 1949, available online at <http://www.icj-cij.org/icjwww/idecisions.htm> (last visited 1 September 2003).

Judge Shi further noted that non-State actors have developed a specific role in international governance and that the relationship between States and non-State actors is symbiotic. Although States remain the only actor capable of fully operating within the international system, the growth in the importance of non-State actors constitutes a vital exercise in democracy and pluralism. He also observed that non-State actors have highlighted the inability of States to meet all the needs of the societies they represent. At the same time, however, their activities have emphasized the position of States as the cornerstone of the international legal system. Judge Shi therefore argued that the international legal community should not lose sight of the fact that State sovereignty and the sovereign equality of States are the very foundation of the UN Charter. He concluded by noting that States and non-State actors must build on their mutual advantages and work closely together to develop an international system of governance based on the ideals of justice and respect for fundamental rights, which are genuinely common to all civilizations, cultures and religions of the world. With these distinguished words, the Conference came to an end.

The proceedings of the Sixth Hague Joint Conference will be published by T.M.C. Asser Press.